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No. 82-973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

—against—

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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v

No. 82-973

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IMMIGRATION AND NATURALIZATION SERVICE,
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-against-

PREDRAG STEVIC

PRELIMINARY STATEMENT

This brief is offered by
the American Jewish Committee, the
International Institute of Boston, and
Members of Congress Walter E. Fauntroy,
Major R. Owens and Ed Towns.

The American Jewish Committee, a national organization of approximately 50,000 members, is dedicated to the defense of the civil rights and religious liberties of American Jews. The Committee believes that this goal can best be accomplished by helping to preserve the human rights of all persons. Since its founding in 1906, the American Jewish Committee has maintained a deep and abiding interest in the development of our nation's immigration and refugee policies. Ever mindful of our inability during the 1930's to make our immigration laws more flexible and responsive in order to rescue the untold millions trapped in Europe when war broke out, many of whom later died in Hitler's death camps, the Committee is committed to fundamental humanitarian principle that the United States should play a key role

in providing, together with other free nations, a safe haven for the world's oppressed. The American Jewish Committee has consistently urged a generous immigration policy and resisted all attempts to restrict the definition of a refugee.

The International Institute of Boston is a non-profit, non-sectarian agency providing social services for the limited English speaking and foreign born. The Immigration Legal Department of the Institute provides free or low cost immigration counseling and representation to low income persons. The Legal Department of the Institute has represented over 100 applicants for political asylum in the United States.

Messrs. Fauntroy, Owens, and Towns are members of the House of

Representatives who have an expressed interest in the equitable adjudication of refugee and asylum claims by the United States Government. They are particularly concerned about the position of the Immigration and Naturalization Service on the refugee standard in this matter because they believe that that position contravenes the legislative intent of the Refugee Act of 1980. They believe further that if the INS' interpretation is upheld, it will exacerbate unjust denials of asylum seekers such as Haitians, Salvadorans, Ethiopians and others.

The parties have consented in writing to the submission of this brief.

SUMMARY OF ARGUMENT

The Refugee Act of 1980 sets forth a uniform, non-ideological eligibility standard for refugee status compatible with the humanitarian traditions and international obligations of the United States.

Under the standard, a refugee must establish that he or she was persecuted or has a "well-founded fear of persecution" in his or her home country. This standard differs substantially from the previous standard for withholding of deportation under the Immigration and Nationality Act of 1952, which was interpreted to require an alien to show a "clear probability of persecution."

Petitioner's adherence to the "clear probability" standard violates the Refugee Act of 1980.

THE REFUGEE ACT OF 1980 SETS FORTH
A UNIFORM, NON-IDEOLOGICAL
ELIGIBILITY STANDARD
FOR REFUGEE STATUS

A. The Standard under the Act.

The Refugee Act of 1980^{1/} established a standard for uniform and non-ideological refugee eligibility. Congress intended this new standard to be compatible with the humanitarian traditions and international obligations of the United States. Central to the Act was a statutory definition of "refugee" which conformed to that of the 1967 United Nations Protocol Relating to the Status of Refugees.^{2/} A refugee was defined as

^{1/} Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter the 1980 Act].

^{2/} The United States became a party to the Protocol in 1968. 19 U.S.T. 6223; T.I.A.S. No. 6577.

... any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....

Section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a) (42) (1982). This standard is used to determine claims for asylum under Section 208(a) of the Act, 8 U.S.C. § 1158(a) (1982), and claims for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. § 1253(h) (1982).^{3/}

^{3/} See 8 C.F.R. § 208.3 (1983) [asylum requests "shall also be considered as requests for withholding exclusion or deportation pursuant to Section 243(h) of the Act"].

It is beyond dispute that Congress intended the definition of "refugee" in the 1980 Act to conform to that in the Protocol. See, e.g., 126 Cong. Rec. 3,757 (1980) [Statement of Senator Kennedy: "The new definition makes our law conform to the United Nations Convention and Protocol. . . ."]. During hearings, the derivation of the term was often mentioned and never questioned. This intent was emphasized in the report of the Senate Judiciary Committee and debate on the Senate floor. S. Rep. 256, 96th Cong., 1st Sess. (July 23, 1979), 125 Cong. Rec. 23,231 (1979).

Similarly, throughout House consideration of the bill, references were made to "the fundamental change under the legislation. . .the replacing of

the existing definition of refugee with the definition which appears in the U.N. Convention and Protocol. . . ." Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess., 27 (1979) [hereinafter 1979 House Hearings]; see also id. at 43, 168, 169, 248, 251, 280, 284, 291, 357, 361, 383, 393; 125 Cong. Rec. 35,813-26 (1979).

The purpose of changing the definition was not only to excise ideological bias from immigration law, but also to "facilitate bringing refugees into this country," since only a well-founded fear of persecution would have to be established. 1979 House Hearings, supra, at 169 and 284; Briefing on the Growing Refugee Problem, Hearing Before the Sub-

comm. on International Organizations of
the Comm. on Foreign Affairs, 96th Cong.,
 1st Sess., 4-5 (1979).

- B. The inquiry under the new "well-founded fear" standard differs substantially from that under the prior "clear probability" standard.

The "well-founded fear" standard under the Refugee Act differs significantly from the previous standard used to evaluate withholding of deportation claims. Under the previous standard, the INS had developed a limiting "policy restricting the favorable exercise 'of discretion to cases of clear probability of persecution of the particular individual petitioner'." In re Joseph, 13 I&N Dec. 70, 72 (1968) [citation ommitted]; In re Tan, 12 I&N Dec. 564, 568 (1967); Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967).

"Clear probability," moreover, is a stringent standard.^{4/} See, e.g., In re Tan, 12 I&N Dec. 564 (1967) [voluminous documentation of abuse of ethnic Chinese in Indonesia, letters from relatives and an attack on the family business insufficient evidence]. See also Haitian Refugee Center v. Civiletti, 503

^{4/} It is misleading to assert (Petitioner's Brief at 25) that the Second Circuit "attributed a stringency to the phrase "clear probability" that is inconsistent with [its] own observations in Cheng Kai Fu v. INS," 386 F.2d 750 (2d Cir.), cert. denied 390 U.S. 1003 (1967). Cheng concerned the rejection of a motion to reopen deportation proceedings, and in deciding that the applicant had failed to show even "some evidence" of potential persecution, the court did not hold that "some evidence" would satisfy the burden of showing a "clear probability" of persecution.

F. Supp. 442 (S.D. Fla. 1980), modified,
sub nom. Haitian Refugee Center v.
Smith, 676 F.2d 102 (5th Cir. 1982). In
that case, the district court found evi-
dence of systematic and extensive perse-
cution by the Haitian government in the
cases reviewed, yet not one asylum claim
had been found by INS to meet the "clear
probability" standard. One woman's
father had been killed by the Ton Ton Ma-
coutes who had come for her just after
she had fled. Another had been jailed af-
ter the murder of both her husband and
her son. 503 F. Supp. at 474-510.

In contrast to the "clear
probability" standard, the "well-founded
fear" standard introduces to the inquiry
the character and state of mind of the
individual applicant. See Handbook on
Procedures and Criteria for Determining

Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva 1979) (herein-
after Handbook) at 11-13, ¶¶ 37-41, 45.^{5/}
Fear must be reasonable under the circum-
stances. However, even "[e]xaggerated
fear . . . may be well-founded" if the
applicant's interpretation of the
situation, given his background, is
reasonable. Handbook at 12, ¶ 41.

^{5/} The Second Circuit referred below to the United Nations High Commissioners' Handbook as a distillation of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject." Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982). The Board of Immigration Appeals has itself treated the Handbook as a significant source of guidance as to the meaning of the Protocol. In re Frentescu, Int. Dec. No. 2906 at 4 (BIA June 23, 1982); In re Rodriguez Palma, 17 I&N Dec. 465 (BIA 1980). The pertinent provisions of the Handbook appear in an appendix submitted herewith.

Generally a claimant's fear will also have external indicia. Under the Protocol standard, circumstantial evidence is relevant and admissible, to be evaluated in terms of "the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences" Handbook at 12, ¶ 41 [emphasis supplied].

Thus, under the "well-founded fear" standard, "[d]etermination of refugee status will. . . primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin."

Handbook at 11, ¶ 37. The conditions in the country in question may be relevant as external confirming evidence of the applicant's fear.

C. Adherence to the "clear probability" standard violates the Refugee Act.

Courts have long recognized a "need for special judicial deference to congressional policy choices in the immigration context." Fiallo v. Bell, 430 U.S. 787, 793 (1977). This principle requires respect for legislative intent. "By contrast, the power of the INS is more circumscribed ... [and it] must conform its actions to the statute" Haitian Refugee Center v. Civiletti, 503 F. Supp. at 452.

The Court should reject administrative constructions that are in-

consistent with the mandate of Congress or that frustrate the policy that Congress sought to implement. S.E.C. v. Sloan, 436 U.S. 103, 118 (1978); see also, Morton v. Ruiz, 415 U.S. 199, 237 (1974). The Court should thus require the administrative authorities to "honor the clear meaning of a statute as revealed by its language, purpose and history." International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979). A fair reading of the legislative history shows that the 1980 Refugee Act was designed to adopt the Protocol's "well-founded fear" standard. The Act must be followed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Handbook on Procedures and Criteria for
Determining Refugee Status

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

38. To the element of fear--a state of mind and a subjective condition--is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted"--for the reasons stated--by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective

element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences--in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

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